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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/564,452

01/12/2006

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06/27/2011

EXAMINER

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ART UNIT

PAPER NUMBER

1781

NOTIFICATION DATE

DELIVERY MODE

06/27/2011

ELECTRONIC

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte CHRISTINA AMMANN,
FLORENCE ROCHAT, and CLAUDIA ROESSLE

Appeal 2011-002138
Application 10/564,452
Technology Center 1700

Before LORA M. GREEN, FRANCISCO C. PRATS, and
STEPHEN WALSH, Administrative Patent Judges.

GREEN, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on appeal under 35 U.S.C. § 134 from the Examiner's rejection of claims 1, 2, and 8-15. We have jurisdiction under 35 U.S.C. § 6(b).

STATEMENT OF THE CASE

Claim 1 is representative of the claims on appeal, and reads as follows:

1. A liquid or powdered and reconstitutable nutritional composition comprising 4.5 to 6g protein/100ml composition, a source of digestible carbohydrates and a source of dietary fiber, having an energy density of 1.3-1.8 kcal/ml and dietary fiber in an amount of more than 2.5g/100ml, wherein the source of dietary fiber comprises 20-40% by weight acacia gum, 30- 60% by weight of pea outer fiber and 20-40% by weight of fructooligosaccharides, wherein the composition comprises a viscosity of 30 - 80 mPas.

The following ground of rejection is before us for review:

Claims 1, 2, and 8-15 stand rejected under 35 U.S.C. § 103(a) as being rendered obvious by the combination of Spivey-Krobath¹ and Brassart.²

We reverse.

ISSUE

Has the Examiner established by a preponderance of the evidence that the combination of Spivey-Krobath and Brassart renders obvious a nutritional composition having a viscosity of 30 - 80 mPas, as required by all of the independent claims on appeal?

¹ Spivey-Krobath et al., WO 02/39834 A1, May 23, 2002.

² Brassart et al., US 6,489,310 B1, Dec. 3, 2002.

FINDINGS OF FACT

FF1. According to the Specification, the “invention relates to a nutritional composition [and] to a method for providing nutrition and improving the digestive tract and bowel function and to a method for enhancing mucosal function” (Spec. 1).

FF2. The Specification provides the following example composition:

Component	Conc. (/100ml)	Total Energy (%)
Fibre (total)	2.6	
Soluble (acacia gum)	0.75 g	
Insoluble fibre (pea outer fibre)	1.1 g	
Oligosaccharides (FOS)	0.75 g	
Digestible Carbohydrates (total)	18.8	50
Sugar	4.8 g	
Maltodextrin	13.95 g	
Lactose	0.22 g	
Protein (total)	5.6 g	15
Na caseinate	2.8 g	
Milk protein concentrate	2.8 g	
Lipids (total)	5.85 g	35
corn oil	2.34 g	
low erucic rapeseed oil	2.13 g	
soy bean oil	1.12 g	
milk fat	0.09 g	
mono and diglycerides	0.15 g	
Vitamins		
Vitamin A	420 IU	
Vitamin C	15 mg	
Vitamin D	60 IU	
Vitamin E	2.0 mg TE	
Vitamin K	8.5 µg	
Thiamin Vit. B1	0.18 mg	
Riboflavine Vit. B 2	0.195 mg	
Pantothenic acid	0.75 mg	
Vitamin B6	0.255 mg	
Vitamin B12	0.55 µg	
Niacin	1.8 mg	
Folic acid	36 µg	
Biotin	4.5 µg	
Minerals		
Zinc, Iron, Copper, Magnesium,	1 g	

Manganese, Selenium, Iodine, Potassium, Calcium, Phosphorous, Chloride		
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(Id. at 13-14.)

FF3. The Examiner's statement of the rejection may be found at pages 4-12 of the Answer.

FF4. Specifically, as to viscosity, the Examiner finds that "[g]iven that modified Spivey-Krobath et al. disclose a nutritional composition identical to that presently claimed, it is clear that the composition would intrinsically possess the recited viscosity" (Ans. 6; see also id. at 19).

FF5. Specifically, Spivey-Krobath is drawn to "a nutritional composition for prevention or treatment of an immune condition" (Spivey-Krobath, p. 1, ll. 3-4).

FF6. The composition of Spivey-Krobath "comprises a source of protein, a source of carbohydrate, a source of fat, a probiotic lactic acid bacterium and additionally fructo-oligosaccharides and/or inulin" (id. at 3, ll. 15-17).

FF7. Spivey-Krobath discloses the following examples:

	Daily dose 300ml/day	Daily dose 300ml/day
Energy	480kcal (1.6kcal/ml)	300kcal (1.0kcal/ml)
P/L/C %TEI	26% / 24% / 51%	28% / 30% / 42%
Protein g/100 ml	10.5 (with 6.25 g soy protein)	7.0
Fat g/100ml	4.16	3.3
Carbohydrate g/100ml	20.6	10.5
in daily dose	per 300ml	per 300ml
Na mg	188	188
K mg	350	350
Cl mg	290	290
Ca mg	200	200
P mg	150	150
Ca/P ratio	1.3	1.3
Mg mg	60	60
Mn ug	495	495
A IU	1333	1333
D IU	100	100
E IU	120	150
K1 ug	13.8	13.8
C mg	120	120
B1 mg	0.25	0.25
B2 mg	0.3	0.3
Niacin mg	3	3
B6 mg	2.0	2.0
Folic acid ug	400	600
Panto mg	1.00	1.00
B12 ug	3.8	10.0
Biotin ug	7.5	7.5
Fe mg	2.75	2.75
I ug	75	75
Cu mg	1.5	1.5
Zn mg	15	6
Se ug	100	100
Cr ug	12.5	12.5
Mo ug	18.75	18.75
Inulin & FOS blend (30:70 blend) g	6	6
Lactobacillus cfu/serving	Paracaseli 10 ¹⁰	Johnsonii 10 ¹⁰

(Id. at 10.)

FF8. Brassart teaches a fiber blend for an enteral composition (Brassart, col. 1, ll. 6-8).

FF9. Brassart teaches further that the fiber blend comprises “pea inner fibres, pea outer envelope fibres, inulin, and fructooligosaccharides” (id. at col. 2, ll. 4-7).

FF10. Brassart teaches that the fiber blend may be used in an enteral composition, wherein the enteral composition may comprise a protein source, a carbohydrate source, and a lipid source (id. at col. 4, ll. 50-55).

FF11. Brassart also teaches that the enteral composition may be administered by tube feeding, and “may have a viscosity of less than 12 cp at room temperature” (id. at col. 6, ll. 45-49).

PRINCIPLES OF LAW

In general, a limitation is inherent if it is the “natural result flowing from” the explicit disclosure of the prior art. *Schering Corp. v. Geneva Pharms., Inc.*, 339 F.3d 1373, 1379 (Fed. Cir. 2003). “Inherency . . . may not be established by probabilities or possibilities. The mere fact that a certain thing *may* result from a given set of circumstances is not sufficient.” *MEHL/Biophile Int'l. Corp. v. Milgraum*, 192 F.3d 1362, 1365 (Fed. Cir. 1999)(*quoting In re Oelrich*, 666 F.2d 578, 581 (CCPA 1981)).

ANALYSIS

Appellants argue that “Spivey-Krobath and Brassart alone or in combination fail to disclose or suggest that the nutritional composition comprises a viscosity of 30 - 80 mPas as required by independent Claims 1

and 10-15” (App. Br. 18). Appellants assert that Spivey-Krobath fails to teach or suggest any viscosity for its nutritional composition, and that the only viscosity disclosed by Brassart is about 12 cp, which is outside the claimed range (id. at 18-19).

We agree with Appellants. That is, we conclude that there are so many variables introduced by Spivey-Krobath and Brassart as to the make-up of the nutritional compositions taught, while a composition that has the specified viscosity may be obtained, the Examiner has not established that it would be a natural result that flows from combining the composition of Spivey-Krobath with the pea fiber of Brassart. First, the nutritional composition of Spivey-Krobath also contains a probiotic bacteria. Second, the pea fiber of Brassart not only contains the pea outer fiber, but also contains the pea inner fiber. Thus, the Examiner has not established by a preponderance of the evidence that the combination would necessarily have the required viscosity given those additional components. That conclusion is evidenced by Brassart, which, as argued by Appellants, and not refuted by the Examiner, obtains an enteral composition that has a viscosity outside of the range required by the independent claims on appeal. We are thus compelled to reverse the rejection.

CONCLUSION OF LAW

We conclude that the Examiner has not established by a preponderance of the evidence that the combination of Spivey-Krobath and Brassart renders obvious a nutritional composition having a viscosity of 30 - 80 mPas, as required by all of the independent claims on appeal. We thus

Appeal 2011-002138
Application 10/564,452

reverse the rejection of claims 1, 2, and 8-15 under 35 U.S.C. § 103(a) as being rendered obvious by the combination of Spivey-Krobath and Brassart.

REVERSED

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